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ABSTRACT

The accelerating development of distance education and the use of technology-mediated instructional materials over interactive computer networks has given rise to heightened interest and thought by faculty and administration alike about related copyright issues. The evolution of distance education from early morning television broadcasts to today's use of the Internet and digital technologies has given rise to heightened content-owner concern about the very real threats of piracy and unauthorized use of copyrighted works in education. This paper examines these issues. It provides an overview of copyright law, including a discussion of the exclusive rights enjoyed by copyright owners and the limitations on those rights by certain exceptions and defenses. The paper describes current efforts in Washington that may result in a specific exception designed to promote distance education through digital technologies. This paper also discusses trends in electronic course ownership policies. And it examines the liability of a higher education institution for the infringing actions of its students, faculty, and staff. This paper is designed to provide readers with an overview of essential copyright and intellectual property law as it relates to education in general and to telecommunicated instruction in particular. It is not intended to provide definitive guidance. (VWC)

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ED 436 199

Copyright Considerations in Distance Education and Technology-Mediated Instruction

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"The growth of Distance Education is very exciting. With the increasing sophistication of the Internet and other communication technologies, classrooms are no longer tied to a specific point in either space or time. Virtual classrooms are popping up all over the country, and, indeed, the world, where all kinds of people are interacting and learning through these new media. As exciting as distance education is, the copyright issues it raises are numerous and complex. Distance education will work only if teachers and students have affordable and convenient access to the highest quality educational materials. But without adequate incentives and protections, those who create these materials will be disinclined to make their works available for use in online distance education."

—Statement of Senator Orrin G. Hatch before the U.S. Senate Committee on the Judiciary, Hearing on the U.S. Copyright Office Report on Copyright and Digital Distance Education, May 25, 1999.

Introduction

Whether in the classroom or dorm room, at the job site, at home, across town, across state, or across country, colleges and universities are rushing to employ telecommunications and other information technology tools to improve and enrich the educational experience. Community colleges, research universities, and proprietary institutions are deploying the latest technologies to attract and better serve the educational marketplace.

Recent congressional action reflects the newfound mainstream acceptance of distance education and other forms of technology-mediated instruction. Examples of this acceptance include the creation of the Distance Education Demonstration Program, the Learning Anytime Anywhere Program, further liberalization of student financial aid rules for distant learners in the Higher Education Amendments of 1998, and the congressionally mandated U.S. Copyright Office study of how to promote distance education through the use of digital technologies1# in the Digital Millennium Copyright Act of 1998#2 (DMCA).

The accelerating development of distance education and the use of technology-mediated instructional materials over interactive computer networks has given rise to heightened interest and thought by faculty and administration alike about related copyright issues. Who owns the electronic course created by a faculty member at the direction of the institution? Can faculty use third-party copyrighted materials in CD-ROM and Internet-based courses under fair use or other provisions of the Copyright Act of 1976 without the permission of the copyright owner? Will the institution be liable if one of its students or faculty members infringe on another's copyright through use of the institution's computer network? The evolution of distance education from the early morning television broadcasts of the Sunrise Semester in the 1950s and Instructional Television Fixed Service (ITFS) transmissions in the 1980s to today's use of the Internet and digital technologies has given rise to heightened content-owner concern about the very real threats of piracy3# and unauthorized

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use of copyrighted works in education.

This paper will examine these issues. It provides an overview of copyright law#,4 including a discussion of the exclusive rights enjoyed by copyright owners and the limitations on those rights by certain exceptions and defenses. It describes current efforts in Washington that may result in a specific exception designed to promote distance education through digital technologies. It discusses trends in electronic course ownership policies. And it examines the liability of a higher education institution for the infringing actions of its students, faculty, and staff.

Copyright Basics

Perhaps the best starting point is the origin and purpose of copyright protection, followed by a definition of what copyright is and what rights it confers on owners of copyrights.

A Constitutional Origin

The origin of copyright protection in this country is the Constitution of the United States. It directs Congress to pass laws "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."#5 The central purpose of copyright is not to give a monopoly or economic reward to the author, but to promote the betterment of society by encouraging the creation of, and the public's access to, useful works.#6 As explained later, this balance of interests is codified by granting a number of exclusive rights to owners and then limiting those rights in certain circumstances. The current copyright law of the United States is the Copyright Act of 1976, as amended (the Act).#7

Originality and Fixation

Boiled down to its essence, copyright protection turns on the existence of two essential elements: the creation of an original expression that is fixed in a tangible medium of expression. Facts, discoveries, and ideas in and of themselves are not subject to copyright protection because they do not exist as a result of an act of authorship.#8 For that reason, the Supreme Court has held that collections of data such as the white pages of a telephone directory are not copyrightable because they lack the necessary minimum degree of originality.9# However, factual compilations can be protected by copyright if there is originality in selection, coordination, or arrangement of the data. In general, therefore, what is subject to copyright protection is how authors express facts and ideas in original works of authorship. Novelty is not required, only some modest degree of originality. The degree of originality sufficient to meet this constitutional element is minimal, requiring only that the work be the independent creation of the author. Nevertheless, originality is absolutely essential. Literary, dramatic, musical, artistic, and certain other intellectual works are subject to copyright protection, whether the work is published or unpublished.

Protection Is Automatic

Under the Act, copyright protection adheres immediately with the fixation of the original work of authorship in a tangible medium of expression: on paper, on canvas, on film, or any other medium through which the work can be perceived or communicated, including the Web. It is not necessary to file a copy of the work with the U.S. Copyright Office in

Washington, D.C., or to place a copyright notice on the work.10 #The protection is automatic with the fixation.

Term of Copyrights

For works created after December 31, 1978, the term of copyright protection is the life of the author plus 70 years. For joint works, the term is the life of the last surviving author plus 70 years. 0from the first date of publication or 120 years from creation of the work, whichever is shorter. For works created before 1978 that are still entitled to copyright protection, the total term of the copyright is 95 years.#11

Copyright Registration

The owner of a copyright may choose to register the copyright with the U.S. Copyright Office. Registration is permissive, not mandatory. And, since enactment of the 1976 Act, copyright protection arises as soon as the author's original expression is fixed in a tangible medium. The instructions and forms for registering different types of works are available on the U.S. Copyright Office Web page (see Copyright Registration Procedures at [http://lcweb.loc.gov/copyright/ reg.html]). While registration is not required to obtain a copyright, registration confers distinct benefits on the copyright owner, not the least of which is access to statutory damages and recovery of attorney's fees in the case of an infringement (see Section 412 of the Act).

Copyright Notice

The use of a copyright notice has not been required under U.S. law since the United States adhered to the Berne Convention, effective March 1, 1989. However, use of a notice is often beneficial for works created since March 1, 1989, and still is relevant to the copyright status of older works. Use of a copyright notice informs the public that the work is protected by copyright, and it identifies the owner of the copyright and the year of first publication. If a work is infringed, the appearance of a proper notice of copyright on the published copy accessed by the defendant in a copyright infringement suit generally forecloses a defense of innocent infringement in mitigation of actual or statutory damages. Innocent infringement occurs when the infringer did not realize the work was protected.

Copyright Ownership

There are four forms of copyright ownership under the Act.

1. In general, the owner of a copyright is the author of the work. The author frequently is the creator. For example, the artist creating a watercolor painting, the writer of a novel or a textbook, or the individual who snapped the photograph is the owner of the copyright.

2. A joint work is a work prepared by two or more authors with the intention that the individual contributions be merged into inseparable or interdependent parts of a single copyrightable work (see Section 101 of the Act). This is similar in concept to the normal way in which a husband and wife purchase a home. They are deemed tenants by the entireties, meaning that they both own the property. In a similar vein, the authors of a joint work are considered to be co-owners

under Section 201(a) of the Act. Each owns the whole and may independently exploit the work, but must make an accounting to the other.

3. A collective work contains a number of contributions, each of which is a separate and independent work, that are assembled into a collective whole. Examples are an anthology or an encyclopedia. Under Section 201(c) of the Act, the copyrights in the separate contributions to the collection are distinct from the copyright in the collection itself. In other words, in the absence of a written agreement, the owner of the copyright in the collective work is deemed to have acquired only the rights to reproduce and distribute the contribution as a part of the collective work, whereas each contributor retains the copyright to his or her individual work.

4. The fourth category contains works made for hire, of which there are two types. The first is a work prepared by an employee within the scope of his or her employment. The second type of work made for hire is a work that has been specifically ordered or commissioned for use as a contribution to a collective work—as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as instructional text,12 as a test, as test answer material, or as an atlas if the parties agree in writing that the work shall be deemed a work made for hire. In both of these situations, Section 201 (b) of the Act provides that the employer or other person for whom the work was prepared is the owner of the copyright unless the parties sign an agreement to the contrary. As will be discussed later, there is an increasing trend of colleges and universities claiming ownership to distance education and other electronic courseware created by faculty members on the grounds that these are works made for hire.

Exclusive Rights of Copyright Owners

Section 106 of the Act gives the owner of a copyright what has been called a "bundle of exclusive rights" to exercise or to authorize others to exercise. The exclusive rights of a copyright owner are the rights to:

- reproduce the copyrighted work
- prepare derivative works or adaptations based on the copyrighted work
- distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending
- perform#13 the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works
- display14# the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work.15

Transfer of Rights

The owner of a copyright may dispose of any or all of the exclusive rights in a variety of ways. For example, the North American distribution rights for a novel can be assigned or transferred to one party, whereas the European, South American, African, and Asian distribution rights can be assigned to other entities. At the same time, the right to adapt the novel into a screenplay can be assigned to yet another entity. American noncommercial broadcast rights to Riverdance can be assigned to one public television station or distributor whereas the right to market videotapes of the program may be held by another. Sections 201–205 of the Act spell out the transfer rights of copyright owners.

Copyright Infringement

Any exercise of a copyright owner's exclusive rights without the permission of the owner or the authority of one of the Act's limitations on those rights is an infringement.16 Copyright infringement is a "strict liability offense"17# and those who help or make it possible for another to infringe a copyright may be liable as contributory infringers.#18 There are three types of copyright infringement: direct, vicarious, and contributory.

1. A direct infringer is an individual who violates any of the exclusive rights of the copyright owner (Section 501[a] of the Act).

2. A vicarious infringer is one who has the right to control the infringing activities of another and profits from the infringement, or one who actively operates or supervises the operation of a place where the infringement occurs or controls the content of the infringing program and expects commercial gain or some other direct or indirect benefit from the infringement.

3. A contributory infringer is one who has knowledge of the infringing activity and induces, causes, or materially contributes to the infringing conduct of another. #19

There are a number of myths about what constitutes a defense to a claim of infringement. These include: "(1) that a work isn't copyrighted if it doesn't have a copyright notice on it; (2) using small parts of a work is not an infringement; (3) it is all right to copy a work if you give the author(s) credit; and (4) if the original is modified by the addition of something creative, it is a new work and not an infringement."20# As demonstrated in this paper and in Capone, these are all comfortable, but (except for the possibility of a fair use defense in connection with item 2 inaccurate, defenses.

Infringement Penalties and Remedies

Sections 502–506 of the Act give federal courts a variety of sanctions to impose if a defendant is found to have infringed a copyright. The courts may:

- issue an injunction
- impound and destroy infringing articles

- award actual damages and lost profits proven by the plaintiff

- in the case of a registered work, allow the copyright owner to elect, before a final judgment, to receive statutory damages instead of actual damages of between $500 and $20,000 for the infringement of any one work, and up to $100,000 in the case of a willful infringement

- in the case of a registered work, award attorney's fees and costs

- impose criminal penalties in the case of willful infringement engaged in for the purpose of commercial advantage or private financial gain, as well as order the destruction of all infringing copies and all facilities used to manufacture the infringing copies

Special Rule for Nonprofit Institutions

Section 504(c)(2)(i) of the Act provides an important limitation on remedies in the case of innocent infringement by a nonprofit educational entity. The court can remit damages when an employee of a nonprofit educational institution, library, or archive, acting within the scope of employment and believing that use of a copyrighted work was permitted as a fair use, infringes the copyright by reproducing the work. In addition, Section 504(c)(2) generally permits a court to reduce statutory damages to as little as $200 if it finds that the infringer was unaware, and had no reason to believe, that use of a copyrighted work constituted an infringement.

Are States Immune from Infringement Suits?

A current issue being debated is whether state colleges and universities are immune from infringement suits filed by copyright owners. This question stems from the fact that the Supreme Court has interpreted the 11th amendment to the U.S. Constitution to mean that states and state entities (often including public colleges and universities) are immune from suits by individuals in federal courts unless Congress authorizes the suit or the state waives its immunity by consenting to be sued. A recent key decision that has created uncertainty is the Seminole#21 case in which the Supreme Court held that the 11th amendment prevented Congress from abrogating state sovereign immunity in the context of suits by Native American tribes against the states to enforce the Indian Commerce Clause of the Constitution. The Court's opinion bars Congress from providing for federal suits in a wide range of cases against the states. More specifically, it throws into question the validity of the Copyright Remedy Clarification Act of 1990, in which Congress authorized copyright infringement suits against state entities, in essence providing that 11th Amendment immunity does not apply in the copyright context.22

Further clouding the issue of whether or not states and state entities can be sued for copyright infringement are two cases decided by the Supreme Court in June 1999. In the two companion cases, College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd. (Florida I and Florida II),#23 the Supreme Court held that acts of Congress waiving state immunity to patent and trademark suits, respectively, were too sweeping and, therefore, violated the 11th Amendment. While neither case dealt with the Copyright Remedy Clarification Act, a real question exists as to whether that legislation can stand in

the face of the Florida cases. However, even if the Copyright Remedy Clarification Act is ultimately struck down by the courts, Congress will probably attempt to clarify once again the circumstances under which states and state entities can be sued for infringement.

Limitations on Exclusive Rights

Congress has implemented the constitutional requirement that copyright law promote the "useful Arts" by balancing the exclusive rights of copyright owners with a number of limitations on those rights to facilitate public access to the "useful" information created by authors. These limitations are contained in Sections 107–112 and Section 119 of the Act. While several of these limitations are relevant to education, this paper only discusses the two that are of particular relevance to telecommunicated instruction: fair use (Section 107) and educational use exemption (Section 110).

Fair Use

The fair use doctrine was developed by the courts over the course of many years. It was not until the passage of the Act in 1976, however, that it was codified as a statutory provision. Fair use permits the use of a copyrighted work without the permission of the copyright owner for purposes such as teaching, research, scholarship, comment, criticism, or news reporting. A basic underlying principle of fair use is that it assumes good faith and fair dealing.#24 Fair use can include the ability to reproduce copies of portions of a work, including making multiple copies for classroom use. There is no quantitative or other bright-line test for determining whether a particular use is a fair use or an infringement. Each determination turns on the unique facts of each case.#25

Section 107 of the Act specifies four factors that a court must weigh when determining whether a use without permission is an infringement or is permissible:

1. The purpose and character of the use, including whether the use was for a commercial or a nonprofit educational purpose.

2. The nature of the copyrighted work. The courts accord greater protection to creative works than to factual works.

3. The amount and substantiality of the amount of the work used in relation to the whole work.

4. The effect of the use on the potential market for, and value of, the work.

The courts have tended to give greater weight in their deliberations to factor 3 and, in particular, to factor 4.

Determining whether or not a use is fair is not a simple matter. Just because a small part of a work is used is not necessarily the controlling consideration.#26 A case involving the autobiography of former president Gerald Ford illustrates how courts apply the four-part test of Section 107 to the facts in a case.

Shortly after leaving office, Ford signed a contract with Harper & Row Publishing, Inc., and the Reader's Digest Association to publish his memoirs. The memoirs were to contain

significant never-before published information about Watergate, Ford's pardon of former president Richard Nixon, and "Mr. Ford's reflections on this period of history, and the morality of the personalities involved." Ford gave the companies the exclusive right to license excerpts of the book prior to publication. The companies sold Time magazine the exclusive prepublication license to the memoirs. A few weeks before the scheduled release of Time's 7,500-word excerpt, a political magazine, The Nation, was given an unauthorized copy of the 200,000-word manuscript. Treating the discussion about Watergate and the pardon as a "hot news item," The Nation quickly rushed a 2,250-word article to press that incorporated 300 words from the Ford manuscript. Because The Nation beat Time to the newsstand, Time cancelled its prepublication agreement and refused to pay the balance it owed upon publication. Harper & Row and the Reader's Digest Association then sued The Nation for copyright infringement. The Nation claimed that the fair use doctrine sanctioned its use of a mere 300 of the 200,000 words of the Ford memoir without permission because it was reporting an important news story.

The Supreme Court applied the facts of the case to the four-part Section 107 fair use test. It weighed in The Nation's favor the fact that the memoir was a factual work as opposed to a fictional work. However, it concluded that The Nation's use was an infringement even though only 300 words were used. In reaching that result, the Court noted that the use was for a commercial purpose, and that although only a relatively few words out of the entire unpublished manuscript#27 were taken by The Nation, the words it took were "essentially the heart of the book" and, therefore, the taking directly competed for a share of Time's prepublication market.#28 The weight of the facts led to the Court's conclusion of infringement.

Course Packs. Another area where courts have applied the fair use test in the educational setting is the production of course packs by commercial copy shops. In the Kinko's case, #29 Kinko's solicited lists of assigned readings from professors, then copied excerpts from books without the permission of the copyright owners. The excerpts varied in length from 14 to 110 pages (representing between 5.2 percent and 25.1 percent of the works) and were compiled into bound packets that were sold at a profit to college students. The copyright owners sued, claiming infringement. Kinko's defended its action, in part, on the grounds that the copying of the excerpts was a fair use. The court disagreed and held that Kinko's copying without permission in the circumstances of the case was a violation of the copyright owners' exclusive right to control reproduction of their works, not a fair use. The court found30# the following points:

1. The copying was done by a commercial entity for a commercial purpose.

2. The copying did not transform (for example, interpret or add value to the portions copied, as would a use by a critic or biographer) the works; it merely repackaged them.

3. Kinko's made no effort to expand on or contextualize the copied portions. It was the judgment of the professor, not Kinko's, that determined what and how much was to be copied.

4. While the use of the packets by the students was for educational purposes, Kinko's use of the works was commercial, and the copying was done with the intention of making a profit and to supplant the copyright owners' ability to

market reprints of their works.

5. The works copied were factual in nature.

6. The portions copied by Kinko's were "critical parts" of the works,#31 "since that is the likely reason the college professors used them in their classes."

7. The purchase of the packets containing the excerpts likely undermined sale and licensing of copies of the full text of the works and particularly harmed the market for licensing the use of out-of-print books.

Applying these facts and findings to the four-part fair use test of Section 107, the court concluded that the only factor weighing in Kinko's favor was the fact that the works used were factual in nature. All of the remaining factors (purpose and character of the use, amount and substantiality of the portions used, and the effect of the use on the potential market for or value of the copyrighted work) clearly weighed against Kinko's.

Voluntary Guidelines. Because there is no bright line defining when a use is fair and when it is an infringement, there have been efforts over the years to develop voluntary fair use guidelines governing educational use of copyrighted materials. Classroom copying guidelines were developed by the content owner and educational communities in 1976. These guidelines and others are collected in U.S. Copyright Office Circular 21, Reproduction of Copyrighted Works by Educators and Librarians (1992).32 Circular 21 includes guidelines for use by nonprofit educational institutions with regard to reproduction of books and periodicals for classroom distribution and for off-air copying of television programs.

The Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals (Circular 21 at 9–11) requires that the amount copied be brief, as defined below, and spontaneous. Spontaneity means that the teacher 's inspiration to copy and use the work and the "moment of . . . use" for "maximum teaching effectiveness" are so close that it would be unreasonable to expect a timely reply to a request for permission.#33

For teachers, the Books and Periodical Guidelines allows single-copy reproductions of:

- a chapter of a book
- an article from a periodical or newspaper
- a short story, essay, or short poem
- a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper

For classroom use, the Books and Periodical Guidelines allows the making of multiple copies by or for the teacher for distribution to students of the following works:

- poetry: a complete poem of no more than 250 words, and if not printed, no more than two pages; or an excerpt of not more than 250 words of a longer

poem

• prose: either a complete article, story, or essay of less than 2,500 words, or an excerpt from any work of prose if not more than 1,000 words or 10 percent of the work, whichever is less, but in any event a minimum of 500 words

• illustration: one chart, graph, diagram, drawing, cartoon, or picture per book or periodical

• special works: in a work of poetry or prose that combines language with illustrations, an excerpt of not more than two of the published pages and containing not more than 10 percent of the text

In addition, the Books and Periodical Guidelines prohibits using more than one short poem, article, story, essay, or two excerpts of the same author, and not more than three from the same collective work or periodical during one class term. Moreover, a maximum of nine instances of multiple copying per class per term is permitted. These limits do not apply to current news periodicals and newspapers. Other prohibitions include that multiple copying must not be a substitute for the purchase of books, reprints, or periodicals; must not be directed by a supervisor; and may not be repeated with respect to the same item over multiple terms. The charge to the student may not exceed the actual reproduction cost.

The Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes also is included in Circular 21 at page 22. These guidelines permit the off-air recording of a broadcast program simultaneously with its broadcast or cable transmission for use by nonprofit educational institutions. The Off-Air Recording Guidelines requires the following:

• the copying must be made by or at the direction of the teacher

• it must be for use in a classroom or similar places devoted to instruction

• the recording need not be used in its entirety, but the tape may not be altered in any way or combined or merged into teaching anthologies or compilations

• the copy must include the copyright notice broadcast with the program

• the copy may be retained for a maximum of 45 days and then must be destroyed

• the copy may be used once in the course of relevant teaching activities, and repeated once for instructional reinforcement if needed within the 45-day window

• after the first 10 consecutive school days, off-air recording may be used up to the end of the 45-day period only for teacher evaluation purposes and not for exhibition to students

• programs may not be regularly recorded in anticipation of need

• a limited number of copies of the recording may be made to meet legitimate

needs of teachers

- the educational institution must establish procedures to maintain the integrity of the Off-Air Recording Guidelines.

More recently, there have been efforts to develop fair use guidelines for distance education and electronic multimedia as part of the Con- ference on Fair Use (CONFU) convened by the Clinton Administration. In November 1998, CONFU published the Final Report to the Commissioner on the Conclusion of the Conference on Fair Use [http://www.uspto.gov/web/offices/dcom/ olia/confu/confurep.htm]. The Fair Use Guidelines for Educational Multimedia grew out of the CONFU process under the auspices of the Consortium of College and University Media Centers (CCUMC) [http://www.indiana.edu/~ccumc]. The CCUMC guidelines are published at [http://www.indiana.edu/~ccumc/mmfairuse.html].

The CCUMC guidelines are an effort to clarify the application of fair use in educational multimedia projects of faculty and students. Essentially, they permit the incorporation, without permission, of limited portions of lawfully acquired copyrighted material for up to two years in educational multimedia projects created by faculty or students as part of a systematic learning activity of nonprofit educational institutions. The specific limitation on the amount of material that can be used (length of a film clip, number of words from a printed work, number of photographs from a collection) varies with the type of work used. The CCUMC guidelines have not been endorsed by the higher education and library community, which objects to the scope of the portion and time limitations.

The Educational Use Exemption

Section 110 of the Act gives nonprofit educational institutions the ability to use copyrighted works in certain face-to-face settings, and a more limited right to transmit certain types of works without the permission of the copyright owner.

Section 110(1) specifies that instructors and students at nonprofit educational institutions can perform or display copyrighted works in a classroom or similar place devoted to instruction in the course of face-to-face teaching activities. Note that it applies only to performance and display rights and does not permit reproduction, distribution, or the making of derivative works. There is a proviso that if a copy of a movie or other audiovisual# work34 is being used under this exemption, the copy must have been lawfully made.

Section 110(2) of the Act allows, in part, the performance of nondramatic literary and musical works, or the display of other works by means of transmission,#35 without the permission of the copyright owner if:

- the performance or display is a regular part of the systematic instructional activities of a nonprofit educational institution or governmental entity

- the performance or display is directly related and of material assistance to teaching content

- the transmission is intended primarily for reception in a classroom or similar

> place devoted to instruction, by persons with disabilities or other special circumstances#36 that prevent their attendance in classrooms or similar places devoted to instruction, or by employees of government bodies as part of their official duties

Although Section 110(2) seems to cover distance education, it is, in reality, a narrow exemption geared to the forms of distance education in existence in the mid-1970s. Both the plain language of the provision, which limits performance to nondramatic literary#37 and musical works, and the legislative history accompanying the Act, make clear that Congress did not intend this to be a sweeping grant for educators. Instead, Section 110(2) is intended to permit "certain uses of works in the course of instructional broadcasting"38 #and closed circuit transmissions such as linking an overflow classroom with a larger lecture hall. It permits displays of all types of works but only performances of nondramatic literary and musical works. The exclusion of performances of dramatic and audiovisual works from the permission conferred by Section 110(2) reflects congressional concern that instructional broadcasts of such works could undermine the market for the works.#39 Moreover, it is important to keep in mind that this provision was written nearly 25 years ago, long before the practice of distance education had developed into its current breadth and variety of forms. One of the problems with Section 110(2) is that it appears audiovisual works cannot be transmitted without permission. However, the use might be permitted under the fair use doctrine.

Furthermore, an ambiguity arises under Section 110 with regard to situations in which a live classroom performance of a videotape or other audiovisual work is simultaneously transmitted, perhaps by way of ITFS, cable, or the Internet, to distant students. Assume that the instructor has a lawful copy of a film that he or she wants to use in the classroom and to teach distant students. Under Section 110(1), the performance without the specific permission of the copyright owner is permitted in the face-to-face or live-lecture setting. Although the work can be shown in the classroom, Section 110(2) does not permit its transmission. In addition, because of the very nature of digital networks, the Register of Copyrights concluded that Section 110(2) has only limited applicability to courses offered by means of digital computer networks. While digital broadcasts that only implicate performance and display rights and that otherwise conform to the limits of Section 110(2) are permitted under the provision, digital transmissions that involve multiple acts of reproduction and distribution of the work in addition to performance and display implicate rights not covered by Section 110(2).40

Nonprofit Libraries and Archives

Section 108 of the Act gives nonprofit libraries and archives the ability to make a single analog copy of a work for the purposes of preservation or interlibrary loan. The DMCA amended Section 108 to permit nonprofit libraries and archives to make up to three copies for such purposes by either analog or digital means, provided that the digital copies are made available to the public only on the library premises. The DMCA amendment also enables the library or archive to copy a work into a new format if the original format of the work is obsolete. By obsolete, Congress means that the machine or device used to perceive the work is either no longer manufactured or is not reasonably available in the commercial marketplace.

Licensing

The rights of copyright owners may be transferred in whole or in part to others through sale, donation, inheritance, operation of law, and licensing (Section 201[d] of the Act). The ability to use preexisting works of others in distance education courseware may be sanctioned by fair use or by Section 110 of the Act. In addition, permission to use the material also may be obtained by securing a license to use the work directly from the copyright owner or through a collective licensing organization such as the Copyright Clearance Center, ASCAP, and BMI.

There are three types of licenses that currently are used in conjunction with digital distance education courses: site licenses, transactional licenses for analog uses, and transactional licenses for digital uses.#41 A site license authorizes "all uses of a certain type of a number of copyrighted works, by a particular user or group, for a set length of time."#42 If the works covered by the site license are owned by different copyright owners and an annual fee is charged, the license is generally termed a blanket license. In the educational context, site licenses typically are negotiated to authorize use of software and databases of scholarly works, including collections of periodicals and journals. They are negotiated to address projected multiple uses, reflecting the size and nature of the user community. They generally authorize access to the covered works by a specific group of users located at a specific physical site (a college campus), but they may also authorize access or use by a defined group without regard to their physical location.

Transactional analog use licenses authorize course packs and other supplementary materials to be reproduced on paper and sent to distance education students. License fees are typically paid per student. Transactional digital use licenses authorize a specific use of a work in digital form. These licenses permit digital course packs, digitization of analog materials, or reproduction, distribution, performance, or display of a work in digital form. Transactional licenses impose fee-for-use charges. The license fee imposed is determined by the specific facts of the use.

Because the fair use doctrine and the Section 110 provisions can be ambiguous, it is always safer to obtain permission through licensing if possible. Difficulties in licensing works for use in distance education courses most likely will materialize when audience size or owner concern over the impact on revenue and the integrity of the copyrighted work increases, or when the traditional medium of distribution changes. A well-drafted license agreement should recognize and provide for these contingencies. Describing the technologies that will be used to protect the integrity of the work—such as passwords or firewalls—is critical. To ensure that distribution rights under the license are not limited to the initial transmission, agreements should, whenever possible, expressly state that the institution is authorized to distribute the licensed work to enrolled students by means of all applicable distribution technologies that the institution may use during the term of the license.43 #

Problems with licensing of preexisting works for use in distance education, particularly digital distance education, will be discussed later in this paper. These problems include difficulty in determining who owns the work, tardy responses to requests to license, and cost.

Some of the principal U.S. collective licensing organizations are:

1. The Copyright Clearance Center, for reproduction of text [http://www.copyright.com]

2. Copyright Permission Pages#,44 for use of books and journals [http://www.law.wfu. edu/library/copyright]

3. Media Image Resource Alliance, for use of photographs online [http://www.mira.com]

4. Motion Picture Licensing Corporation, for public performance of home videos and videodiscs [http://www.mplc.com]

5. ASCAP, for performance of musical works [http://www.ascap.com]; BMI [http://www.bmi.com]; and SESAC [http://www.sesac.com]

6. The Harry Fox Agency, for reproduction and distribution of musical works in phonorecords45# and for synchronization rights46 [www.nmpa.org/hfa.html]

International Implications

One distance education copyright issue that has received scant attention is what law applies when a course is delivered by a U.S. institution to students in foreign countries. A number of legal issues are raised by such transmissions, including whether the law of the transmitting country or the receiving country will be applied to determine:

- the scope of the copyright owner's rights

- whether the distant educator's use of a copyrighted work is permissible or an infringement

- whether any negotiated license to use a work is valid, and how the license should be interpreted

- who owns the distance education course

- which country has jurisdiction over the case, what is the proper venue, and how any judgment is to be enforced

There are no clear answers to such questions, and the uncertainty is compounded when the courses are digitally transmitted. In what country did an allegedly infringing act take place: the domicile of the transmitting educational institution, the location of the server, where the distant student is enrolled, or the location where the student receives the transmission? No concrete guidance can be provided at this point other than to observe that the U.S. Copyright Office Report noted that a number of countries are considering amendments to their laws to address digital distance education issues.47

A Distance Education Exemption?

This section discusses the U.S. Copyright Office's May 25, 1999 Report on Copyright and Digital Distance Education. The report was prepared pursuant to the mandate of Section 403 of the DMCA. It directed the Register of Copyrights to conduct a study and make recommendations as to how to "promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works."

To summarize, the Register recommended that Congress should:

1. Amend Section 110(2) of the Copyright Act to bring it into the digital age.

2. Clarify that fair use be fully applicable in the online environment.

3. Defer consideration of the need for a stand-alone distance education exemption until newly emerging (a) licensing schemes and (b) technologies are in place that can facilitate licensing and can limit delivery of distance education courses to enrolled students, and students' ability to engage in unauthorized copying and downstream distribution.

In April 1998, Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, called representatives of content owners, educators, and librarians together in an effort to agree on the elements of a new distance education exemption that could be included in the DMCA. Progress was made, but the two groups could not reach an agreement largely because of uncertainty about whether the technology exists to ensure that only enrolled students could access copyrighted material incorporated in distance education courses and that unauthorized duplication and retransmission of the copyrighted material could be prevented.

In response to the parties' inability to reach agreement, Section 403 was added to the DMCA directing the Register to send recommendations to Congress by April 28, 1999, regarding what limitations should be imposed on the exclusive rights48# of copyright owners to promote digital distance education while maintaining the Copyright Act's balance between the rights of copyright owners and the needs of users of copyrighted works. In developing the recommendations, Section 403 instructed the Register to consider:

- the need for an exemption from the exclusive rights for online distance education

- the categories of works to be included in a distance education exemption

- whether appropriate quantitative limitations on the portion of the work that may be used should be imposed

- the parties entitled to use the exemption

- the parties eligible to receive distance education material under the exemption

- whether and what types of technological measures to limit access, reproduction, and retention of protected works made available under the exemption should be required as a condition of institutional eligibility to use the exemption

- the extent to which the availability of licenses to use copyrighted works in interactive, digitally delivered distance education should be a factor in evaluating the need for an exemption

- other interactive, digital distance education issues thought to be relevant

Register's Findings

The Register's key findings49 about distance education included such facts as:

- distance education is a "vibrant and burgeoning field"50

- distance education is at a "particularly critical point in time "

- distance education is rapidly expanding because of the use of digital technologies

- the new technologies provide greater "interactive experience that more closely parallels face-to-face teaching"

- the new technologies have made distance education courses "more convenient and better suited to the needs of different students"

- distance education is "reaching wider audiences, covering all segments of the population "

- the postsecondary audience is increasing at the fastest pace because of distance education's "responsiveness to the needs of an older, non-traditional student population"

- the audience includes professionals seeking professional development or training courses and retirees

- the expansion of distance education has led to changes among the providers of the instruction, "with courses offered by both nonprofit and for-profit entities, on both a nonprofit and for-profit basis, through varieties of partnerships among educational institutions and corporations"

- many educational institutions have had "recurrent problems with licensing for digital distance education" (primarily difficulty in locating the copyright owners, tardy responses, or unreasonable costs)

- educational institutions commonly "limit access" to distance education courses

to "students enrolled in a particular class or institutions" through, for example, the use of firewalls, passwords, IP address and domain name screening, hardware connections, and encryption or the use of CD-ROMs for delivery

• the federal government has actively promoted distance education in recent years through the enactment of new student aid rules and funding programs

• current copyright law does not adequately address the needs of distance education or content owners

The Register concluded that some change in copyright law was needed now but that further action should be deferred for a few years to assess the impending impact on distance education of emerging protective technologies and easier licensing schemes.

The Educational Use Exception

In addition, the Register concluded that in 1976, when Section 110 was adopted, it was the intent of Congress that the face-to-face teaching and transmission provisions of Section 110(1) and 110(2) together would cover "all of the various methods by which performances or displays in the course of systematic instruction take place."#51 As noted above, Section 110 provides two exemptions from the exclusive rights of copyright owners for certain types of educational performances and displays by nonprofit educational institutions.

Section 110(1) is the broader provision, permitting the performance or display (but not reproduction or distribution, or creation of derivatives) of any type of copyrighted work in face-to-face teaching situations. It does not apply to distance education. Section 110(2) is narrower, permitting the display of any type of work but the performance of only nondramatic literary and musical works by means of open or closed circuit instructional broadcasting. To be eligible under Section 110(2), the transmission must be part of the systematic instructional activities of the nonprofit educational institution and directly related or of material assistance to the teaching content, and be intended primarily for reception by students located in a classroom or similar place devoted to instruction who, because of disabilities or other special circumstances#,52 are not able to attend regular daytime classes at a campus. The narrow language of Section 110(2) and the nature of digital technologies limit the applicability of Section 110(2) to digital distance education#.53

The Register also concluded that the intent of Congress in Sections 110(1) and 110(2) to permit certain uses of copyrighted works in connection with education in classrooms and by means of transmissions without resort to a license or fair use has been thwarted because the technology of distance education has so fundamentally changed since 1976.54 To redress this problem and to bring Section 110(2) into the digital age, the Register recommended the following actions to Congress:

1. Clarify, through legislative history, that both digital and analog means of transmission are covered by Section 110(2).

2. Expand the coverage of rights exempted by Section 110(2) to the extent technologically required by adding reproduction and/or distribution needed to accomplish digital transmission. This includes the making of transient copies created as part of the automatic technical process of digital transmission of an

exempted performance or display.

3. Specify that the performance or display must be mediated—made by or at the direction of an instructor—to illustrate a point in, or as an integral part of, a class session in a particular course. In other words, the use of the work would have to be an integral part of the distance education class and controlled by the instructor, rather than for supplemental or background information. The intent would be to permit a performance or display that is analogous to activity that would occur in a live classroom setting.

4. Eliminate the physical classroom requirement, but limit the benefit of the amended provision to students "officially enrolled in the particular course for which the transmission is made." Add a condition that the transmission must be made "solely, to the extent technologically feasible, for reception by the defined class of eligible recipients."

5. Add new safeguards to counteract the new risks to the integrity of the copyrighted works used under Section 110(2). These safeguards could include requirements to retain transient copies only for the period of time "reasonably necessary to complete the transmission, " require institutions to provide students, faculty, and staff with information that describes and promotes copyright law compliance and notify students that materials used in a course may be covered by copyright,55 and employ technological measures that "reasonably prevent" unauthorized access and dissemination of works after they have been transmitted in digital form.

6. Continue to limit eligibility to use Section 110(2) to nonprofit educational institutions.56

7. Expand the categories of works covered by the Section 110(2) performance exemption beyond nondramatic literary and musical works,#57 but provide limitations and safeguards to protect the integrity of, and market for, the work. For example, Section 110(2) could be broadened to permit the performance of only "reasonable and limited portions" of additional categories of works, including audiovisual works,58 but require that the portion performed must be the subject of study in the course, not for the entertainment of the students, unrelated background, or transition.59

8. Require that the performance or display of a work be made from a lawful copy.

Ephemeral Recordings

Section 112 governs ephemeral recordings and authorizes those the Copyright Act permits to transmit performances and displays of copyrighted works to make a limited number of copies of the works for the limited period of time needed to facilitate the transmission. Section 112(b) confers this right, in part, on nonprofit educational institutions permitted to perform or display works under Section 110(2). The Register's proposed amendment to Section 110(2) itself would not permit the reproduction needed for an instructor to post the work to be performed or displayed on a Web site for later use by students enrolled in the

course. Unfortunately, Section 112(b) has limited applicability for digital transmissions because probably it does not apply to reproductions needed to upload a work to a server or displays of the work to students.

To permit such asynchronous digital distance education to occur, the U.S. Copyright Office recommends adding a new subsection to Section 112 that would allow an educator entitled to transmit a performance or display under Section 110(2) to "upload a copyrighted work onto a server, to be subsequently transmitted under the conditions set out in section 110(2) to students enrolled in the course."60 This new provision would include requirements that limit retention and use of the copy solely to the entity that made it, making any further copies, using the copy solely for transmissions authorized by Section 110(2), and retention of the copy on the server to the time needed for students to access the work during the course. In addition, the reproduction would have to be made from a lawful copy of the work, copying of the work from the Web site to the instructor's computer would not be permitted, and any technological protections to prevent unauthorized copying applied to the work by the copyright owner may not be removed.

Fair Use

The Register found that fair use is a critical tool for educators. In the proper circumstances, fair use allows educators to use copyrighted material without obtaining permission from the copyright owner. Indeed, in the appropriate circumstance, fair use may permit the performance of more than a limited portion of a work in an educational transmission even though the use may not be permitted under Section 110(2).#61 The Register concluded that there is considerable confusion and misunderstanding about fair use, noting that while fair use is a flexible doctrine, its flexibility creates uncertainty and a lack of predictability. The Register, therefore, recommended that Congress clarify in legislative history language the scope of fair use in digital distance education in the following manner:

1. Confirm that fair use is technology-neutral and applies to activities in the digital environment.

2. Provide examples of digital uses of works likely to qualify as a fair use.

3. Clarify the relationship between voluntary fair use guidelines and other Copyright Act defenses by explaining that guidelines do not have the force of law, but are intended to create a safe harbor rather than a cap on what is permitted.

In addition, the Register encouraged representatives of copyright owners, educators, librarians, and other interested parties to engage in discussions under the direction of Congress that could lead to the adoption of consensus guidelines on the application of fair use to digital distance education.

Licensing

The Register concluded that licensing will "continue to be the rule for educational uses not covered by exemptions or fair use," such as performances of entire audiovisual or dramatic works.#62 The U.S. Copyright Office report suggests that Congress may want to address the issue of what happens when an educator wants to obtain permission to use a

copyrighted work in a distance education class but cannot locate the owner of the work (these works are sometimes termed orphaned works). The problem will worsen with the recent extension of the term of copyrights63# and the fact that digital technologies have revitalized the market for some older works. The Register noted that Canada handles the orphaned works problem through compulsory licensing. She also noted that the advent of effective licensing and protective technological measures is on the horizon and may address many of the licensing difficulties that educators described to the U.S. Copyright Office. Therefore, the Register recommended that Congress wait two or three years to assess the impact of these new developments before considering a new stand-alone digital distance education exemption or a legislative solution to licensing issues.

The U.S. Copyright Office's recommendations set the framework for the real debate on copyright and distance education that will occur in Congress throughout the balance of 1999 and perhaps into 2000. Legislation implementing at least some of the Register's recommendations may soon be introduced in both the House of Representatives and the Senate.

Ownership of Distributed Learning Courseware

As more and more colleges and universities incorporate telecommunications-based courseware and delivery methods, faculty and administrators are increasingly asking "Who owns the electronic course?" Faculty members tend to view electronic courseware in the same way they view lecture notes, textbooks, and articles, as "This is the product of my solitary intellectual endeavors; I am the creator and author of the work; therefore I am the owner, not my employer." This view of copyright ownership of scholarly works is premised on academic freedom and the traditional academic exception. A scholarly work created by an instructor within the scope of employment or at the direction of the dean is, by law, a work made for hire and, therefore, owned by the institution. However, it is common to find that higher education intellectual property policies voluntarily confer ownership of such works on the faculty member.

This latter approach has its foundation in an early 19th century English decision 64# and it was to some degree followed in the United States under the Copyright Act of 1909.65 Two federal decisions under the Copyright Act of 197666 held that the instructors owned the copyright in their academic writings, relying, in part, on the English decision, and the fact that until the adoption of a definition of a work made for hire in the 1976 Act, a few courts adopted a "teacher exception" under which academic writings were presumed not to be works made for hire. Whatever its genesis, the tradition or practice developed in academia that textbooks and similar traditional works of faculty were, in essence, excepted from the work made for hire rule. A contrary practice exists with regard to campus patent policy. By far the prevailing approach is that all patentable inventions developed at the institution by faculty, staff, or student employees are owned by the institution under the work made for hire doctrine. Institutions typically take the position that such patentable inventions are due largely to the use of expensive and valuable resources such as laboratories and equipment, and the use of support staff provided by the employer institution to the inventor.

Even with the complete rewrite of the Copyright Act in 1976 and the adoption of a definition of works made for hire, the great majority of colleges and universities have continued to honor the teacher exception of excluding traditional works such as textbooks, lecture notes, journal articles, tests, and the like from the institution's works made for hire policy.#67

However, the trend appears to be moving toward a work made for hire approach for distributed learning courses, at least where substantial institutional resources are employed in the development and production of the electronic course: essentially, the typical institutional patent model. The use of substantial institutional resources, in the view of many administrators, takes electronic courses out of the realm of the model of a single academic producing a work on his or her own, and justifies institutional ownership. One university administrator/ observer describes the transition in the following manner:

> "What until now has been a process largely controlled by the individual instructor, who both produced and provided the education given to students, instruction and learning now can be provided through intermediaries such that producer and provider are being separated and teacher and taught are also separated by both time and distance. In this new mode, the instructional process becomes a group activity in which content experts, instructional designers, technologists, artists, editors, and others work on a project together. Once generated, a course may be continuously updated by the same or another team. University faculty therefore are now asking a question unheard even five years ago: Who owns a course?"#68

A 1998 survey of community colleges undertaken by the Instructional Telecommunications Council (ITC), an affiliated council of the American Association of Community Colleges# (AACC),69 generally confirms the conclusion that institutions are moving to a work made for hire approach for electronic courses. The ITC survey found that 45 percent of the institutions surveyed claimed ownership of the course, whereas another 24 percent shared ownership with the faculty member. Eleven percent granted ownership of the course to the faculty member.

If an institution elects the work made for hire model for electronic courseware, a key issue is defining when the use of resources is "substantial." The University of Texas System policy describes significant as encompassing resources different in kind or amount than those normally provided to faculty.#70 For example, providing an office with a telephone line and a word processor most likely would not be deemed substantial. However, provision of release time; reduced load; a stipend; use of other employees of the institution, such as course designers, programmers, graphic artists, technicians and other professionals, and paid research assistants; and the use of studios, media, laboratories, CD ROM facilities, and the like might reasonably be considered substantial.

Under the copyright policy of The George Washington University (GWU), "substantial use of University resources" is intended to capture the use of resources that fall outside the scope of the faculty member's normal job responsibilities or the use of resources that are not ordinarily available to all or virtually all faculty with comparable status. In such cases, Section 4.1 of the policy requires employees to assign ownership in the work to the university.#71 Furthermore, the GWU policy provides that absent a written agreement to the contrary, "all audio, audiovisual, video and television works and broadcasts created by an employee or . . . with the use of University audio, video, television and broadcasting facilities and resources shall be treated as works made for hire."#72

Two other ownership considerations need to be mentioned. If the electronic work is the result of the work of two or more creators who have contributed copyrightable expression to the finished product and merged their contributions into one inseparable work, the

electronic course could be considered a joint work. The Act permits joint owners of copyrighted works to individually exploit the work, subject to an accounting to the other joint owners for any profits earned from the work. Therefore, a situation could arise where the faculty member, together with a graphic artist who is working within the scope of employment, create a single, inseparable electronic course. Each has contributed copyrighted expression. In this circumstance, where an institution observes the textbook tradition for faculty and the work made for hire model for other employees, absent a contract to the contrary, the faculty member and the institution could be deemed to be joint owners.

Finally, an electronic course could be considered to be a collective work under the Act if it consists of the integration of a number of individual copyrighted works into a final product. Absent a written agreement, such a collective work might be owned either by the institution or the faculty member who assembled the course, depending on the copyright policy in force. Unless the individual contributors expressly transferred their rights to the institution, the owner of the copyright in the collection could only reproduce and distribute the course in its entirety and would be prohibited from exploiting the individual contribution.

Perhaps the more important issue is who can use the work, regardless of who owns it. Any policy or agreement between an educational institution and its faculty members that specifies faculty member ownership of electronic works should provide the institution with a royalty-free, nonexclusive license, at least for a specified period of time, to make adaptations of, and to transmit, distribute, perform, reproduce, or display the electronic coursework to its students regardless of their location. If the institution is the owner of the work, the policy should give the creating faculty member a royalty-free, nonexclusive license, at least for a limited period of time, to use the work at another nonprofit institution in the event of a change of employment. The policy also should deal with the faculty member's right to attribution and the right to update the course.

Having described the ownership issue from the perspective of institutional policies and surveys, it is important to acknowledge that the American Association of University Professors (AAUP) in June 1999 adopted a new policy on the role of faculty in distance education. The policy, "Distance Education and Intellectual Property," includes a Statement on Copyright.73 The Statement on Copyright notes that the "prevailing academic practice" has been to recognize the faculty member as the owner of the copyright in works created independently and on the faculty member's own initiative for "traditional academic purposes," regardless of the physical medium in which the works appear.#74

AAUP maintains that the traditional faculty ownership model should "ordinarily apply" to the development of distance education courseware, although the association recognizes that the new instructional technologies have created some areas of uncertainties in the intellectual property relationship between faculty and their institutions. Such uncertainty can typically arise when a distance education course authored by a faculty member and incorporating his or her instructional content is developed and produced with the assistance of institutional "specialized services and facilities . . . that go beyond what is traditionally provided to faculty members generally in the preparation of their course materials."#75

AAUP takes the position that because no single policy can fairly allocate ownership between faculty and the institution, the parties should enter into contracts prior to the development of courseware that will deal with ownership, control, use, and compensation.

The Statement on Copyright concludes that:

> Whoever owns the copyright, the institution may reasonably require reimbursement for any unusual financial or technical support. That reimbursement might take the form of future royalties or a nonexclusive, royalty-free license to use the work for internal educational and administrative purposes. Conversely, where the institution holds all or part of the copyright, the faculty member should, at a minimum, retain the right to take credit for creative contributions, to reproduce the work for his or her instructional purposes, and to incorporate the work in future scholarly works authored by that faculty member. In the context of distance-education courseware, the faculty member should also be given rights in connection with its future uses, not only through compensation but also through the right of "first refusal" in making new versions or at least the right to be consulted in good faith on reuse and revisions.

Compensation and Incentive Policies

There seems to be a trend to provide incentives to spur the development of media-based courses. Institutions commonly give faculty some form of salary enhancement or compensation for the development and production of electronic courses. This may take the form of a stipend, reduced teaching load, overload payments, teaching load credit, per hour of live interactive instruction fees, head count fees, or some other form of incentive such as a sharing of royalties. Some institutions also give credit with regard to faculty retention, promotion, and tenure. The Oklahoma State University Institute for Telecommunications76 conducted a survey in 1996 of the distance education compensation policies of four-year institutions. The following table summarizes the findings.

Faculty Compensation for Teaching at a Distance (Survey of Four-Year Higher Education Institutions)

Number of Compensation	Institutions Percentage
Inload	359 42.49
Overload	232 27.46
Credit for Promotion	43 5.09
Credit for Tenure	42 4.09
Compensatory Time	8 0.95
Release Time	72 8.52
Other	89 10.53
Total Response and Percent	845 100.00

In another survey, the ITC examined community college compensation policies for full- and part-time faculty for teaching live interactive, modem-based, prepackaged, and print-based courses. Their survey also found a range of compensation formulae. These range from no additional compensation at all to regular load/normal enrollments, regular load with added pay after a seat maximum, regular load with no enrollment ceiling, regular load for in-class students and per-head for remote students, overload treatment, additional preparation time for the first class, and additional stipend for course development.

For full-time faculty teaching live interactive courses, for example, more than 40 percent of

the responding institutions treated these courses as regular load, about 12 percent as overload, about 14 percent provided additional preparation time for the first class, and 6 percent provided a stipend for course development. Full-time faculty prepackaged course findings were about 50 percent treatment as regular load, about 30 percent overload, about 6 percent additional preparation time for the first class, and less than 5 percent stipend for course development. Modem-based course results disclosed no set practice other than a slight reduced enrollment for the first offering of 0the class.

With regard to the payment of royalties for distance education courses, there does not seem to be a dominant trend. When institutions claim ownership of the telecourse, they tend to receive all royalties that may be earned on the work, although a sharing of revenue with the creator of the work is increasingly common. When the faculty member is deemed the owner, he or she receives the royalties, but often with the caveat that where the faculty member has made extensive use of substantial institutional resources in developing and producing the telecourse, royalty sharing is common and negotiated on a case-by-case basis.

The Intellectual Property Audit

Before embarking on an extensive and expensive program to create and distribute distance education programs, an institutional intellectual property (IP) audit should be performed. This involves collecting existing IP policies of the institutions, organizing the various primary materials to be exploited, and all pertinent agreements covering rights to these works. Oral understandings should be set down in writing and questions of ownership and rights to exploit materials resolved. As new works are created, written policies or agreements should delineate the ownership and use entitlements. All trademarks and service marks to be used should be protected and the most important ones registered with the U.S. and foreign government trademark offices as appropriate. On an ongoing basis, the material created and used in the program should be properly archived and registered with the U.S. Copyright Office.

Online Copyright Infringement Liability

Enactment of the DMCA in fall 1998 brought to a close a multiyear effort by content owners, copyright users (including libraries, community colleges, and other educational interests), the Clinton Administration, and Congress to clarify the responsibilities of Internet service providers (ISP) for the copyright-infringing activities of their subscribers.77# This law is of importance to colleges and universities because educational institutions that provide Internet and online access to their students, faculty, and staff are considered to be ISPs, just like America Online (AOL) and other commercial service providers. The DMCA establishes a system of liability safe harbors and implements the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty. This section summarizes the major provisions of the DMCA and their impact on nonprofit educational institutions.

ISP Liability Safe Harbors

Title II of the DMCA creates a new Section 512 of the Copyright Act of 1976. The safe harbors created by Section 512 are a guarantee that ISPs that comply with the guidelines of the DMCA will have limited liability for the copyright-infringing activities of their subscribers and for certain routine activities. Failure to comply with the guidelines, however, will not

automatically result in copyright liability for the ISP; existing defenses, including fair use, are not affected by the DMCA. The following are ISP activities protected from liability by the safe harbors.

Passive Transmission

The automatic transmission, routing, or providing of connections for subscriber-infringing material through an ISP's system without modifying content.

Cached Copies

The intermediate and transitory storage of cached copies of infringing material on an ISP's system.

User-Stored Information

The storage by a user or subscriber of infringing material on an ISP's system if the ISP has no knowledge or reason to suspect that the material is infringing. However, if the copyright owner notifies the ISP that material on its system infringes a copyright, the ISP must remove the material or disable access to it.

Information Location Tools

The linking or referring of subscribers to online sites containing infringing materials.

Indemnification for Misrepresentation

The misrepresentation to an ISP that material is infringing or noninfringing renders the party providing the false information liable to the ISP for damages stemming from reliance on the misrepresentation.

Wrongful Takedown

An ISP's good faith compliance with the DMCA's directions for removing or disabling access to allegedly infringing material shields the ISP from liability to subscribers or third parties for wrongfully taking down or blocking access. The safe harbors for Passive Transmission and Indemnification for Misrepresentation are automatic. The prerequisites for the other safe harbors are

Cached Copies. The ISP must refresh, reload, and update material on its system according to the directions of the person making the material available online, and in accordance with prevailing industry standards. The ISP may not interfere with technology that returns normally available traffic and user information to the alleged infringer, unless compliance would significantly interfere with the performance of the ISP's system or caching of material. If the ISP's cached copies are infringing, and the original site from which the ISP cached the copies makes the infringing material available only to those with access keys (such as passwords, credit cards, PIN numbers, and the like), the ISP must not allow access to others. The ISP must remove or disable access to copies of infringing material on its system if notified by the copyright owner that the system-cached copies of

infringing material have been removed from the originating site.

User-Stored Information and Information Location Tools. To access these safe harbors, an ISP must adopt and implement a policy for terminating the access or accounts of repeat infringers. Subscribers must be informed of this policy. The ISP must accommodate standard technical measures employed by copyright owners to identify or protect their works (such as digital watermarks) as long as the accommodation of these measures does not impose substantial costs or burdens on the ISP 's system. The ISP must designate an agent to receive notices of claimed infringements. Information on how to contact the designated agent must be provided both to visitors to the ISP's Web site and to the U.S. Copyright Office#.78 In addition, an ISP must comply with the DMCA's notice, takedown, and restoration procedures. If the ISP receives a notice from a copyright owner that substantially complies with the requirements spelled out by the DMCA, it must remove or disable access to the challenged material and notify the subscriber of this action. The subscriber has the opportunity to provide the ISP with a counter-notification disputing the claim of infringement. If a counter-notice is received, the ISP must provide a copy to the complainant, informing him or her that the challenged material will be restored in 10 business days.

To be a valid notice, the communication to the ISP must substantially comply with the following requirements:

- a physical or electronic signature of the complainant
- identification of the copyrighted work
- identification of the material claimed to be infringing of the owner's copyright
- information enabling the ISP to contact the complainant
- a statement of the complainant's good faith belief that use of the challenged material is not authorized by the owner or by law
- a statement that the information in the complaint is accurate, and under penalty of perjury, that the complainant is authorized to act on behalf of the copyright owner

A communication from the copyright owner or the owner's agent that complies only with the second, third, and fourth items does not constitute a notice under the DMCA if the ISP has made reasonable efforts to contact the complainant and obtain a notice that complies with all of the required elements.

Section 512(e) incorporates a special knowledge rule for nonprofit educational institutions to determine when a nonprofit college or university is deemed to have knowledge of the infringing activities of its faculty members and graduate teaching assistants and, therefore, liability for infringement. It applies only when these employees are performing a teaching or research function. For the purposes of the passivetransmission (for example, routing) and caching safe harbors, such a faculty member or graduate student will be considered independent of the institution, and for the purposes of the user-stored and information-location tools safe harbors, their knowledge or awareness of infringing activities will not be

attributed to the educational institution if:

- the faculty member or graduate student employee's infringing activities do not involve providing online access to instructional materials required or recommended for a course taught at the institution by the employee within the preceding three years

- the institution has received no more than two nonactionable DMCA notifications over the period that the employee engaged in infringing activities

- the institution has provided all users of its network or system with information accurately describing and promoting compliance with copyright laws

On this last item, the legislative history clarifies that an institution will be in compliance with this requirement if it provided access to guidelines or other materials prepared by the Register of Copyrights. Thus, an institution may, but is not required to, develop its own guidance. Moreover, the Register's materials provide a balanced view of copyright, stressing not only the exclusive rights of copyright owned but also the statutory limitations on those rights, including fair use and the educational use and library exceptions.

WIPO Treaty on Copyright

Pursuant to the World Intellectual PropertyOrganization (WIPO) Treaty on Copyright, and effective two years from today, the DMCA is to create a general prohibition on the manufacture, importation, use, or offering to the public of devices the primary purpose of which is to circumvent technological measures that effectively control access to copyrighted works. The general prohibition does not apply to users of works in a particular class of copyrighted works if their access or use of the work is or may be adversely affected in the coming three years.

To that end, during the initial two-year moratorium (and every three years thereafter), the Librarian of Congress must determine whether users of copyrighted works are or are likely to be in the succeeding three years adversely affected by the anticircumvention prohibition in their noninfringing use of a particular class of copyrighted works. Moreover, the new law makes clear that the prohibition does not enlarge the exclusive rights of copyright owners or reduce the defenses and exemptions available to users of copyrighted works.

The new law provides a specific but limited and not very significant exemption for nonprofit educational institutions, libraries, and archives. Access to a copyrighted work solely to determine whether to acquire a copy of the work for a lawful use is not a violation of the anticircumvention prohibition, provided, in part, that the accessed copy is retained only long enough to make the determination and that an identical copy of the work is not reasonably available in another form.

If it is illegal to manufacture, import, or sell the technology, how can a college obtain the equipment in the first place? The exemption is not a defense to a violation of the general prohibition and does not permit the institution to manufacture, import, or offer to the public circumvention technology.

The DMCA protects the integrity of copyright management information79 (CMI) by making it

a violation of law to intentionally remove or alter CMI, knowingly and with the intent to facilitate or conceal infringement provide false CMI or distribute or import for distribution false CMI, and distribute or publicly perform copyrighted works knowing they contain CMI that has been altered or removed without consent of the copyright owner.

Civil remedies for violations of the anticircumvention and CMI provisions of the DMCA include actual and statutory damages, injunctions, recovery of costs and legal fees, and destruction or remedial modification of illegal or infringing devices. Courts have the discretion to reduce or remit damages in the case of innocent violations. In the case of nonprofit educational institutions, libraries, and archives, however, the courts must remit damages if the institution proves that it was unaware and had no reason to believe that its activities constituted a violation. Criminal penalties also are authorized for willful violations for the purpose of commercial advantage or private financial gain. Criminal sanctions do not lie against nonprofit educational institutions, libraries, and archives.

The DMCA is a major and complex piece of copyright legislation. This section has only highlighted portions of the new law to provide educators with a basic familiarity. Careful analysis of the DMCA and review of the facts are required to determine the impact of the law's provisions on the activities of a particular institution. We recommend at a minimum that institutions review their policies and practices with regard to provision of online access to their students and faculty to determine what changes may be needed to obtain the protections of the copyright infringement liability safe harbors of Section 512.

CONCLUSION

This paper is designed to provide readers with an overview of essential copyright and intellectual property law as it relates to education in general and to telecommunicated instruction in particular. It is not intended to provide definitive guidance since the answer to many intellectual property questions, such as whether a use is a fair use or not, turn on the specific facts in each case. Therefore, faculty and administrators should rely on counsel to resolve questions about the application of copyright and intellectual property law to their specific cases.